No. 93-1140 (5)

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1993

JAMES B. BEAM DISTILLING CO.,

Petitioner,

v.

STATE OF GEORGIA; ZELL MILLER, individually and as Governor of the State of Georgia; MARCUS E. COLLINS, individually and as Georgia State Revenue Commissioner; and CLAUDE L. VICKERS, individually and as Director of the Fiscal Division of the Department of Administrative Services,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Georgia

REPLY TO PETITIONER'S SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Pursuant to United States Supreme Court Rule 15-7, Respondents, State of Georgia, *et al.*, respectfully submit this Brief in reply to Petitioner's Supplemental Brief in Support of Petition for Writ of Certiorari, which counsel for Respondents received by facsimile about 3:00 p.m. on December 8, 1994. In light of the fact that this case is scheduled for a conference on December 9, 1994, Respondents are unable to have this Brief printed in time for submission to the Court prior to its conference; however,

Respondents will have the Brief promptly printed and submitted in printed form as soon as possible.

THE INSTANT CASE HAS SIGNIFICANT DIFFERENCES FROM, AND IS NOT CONTROLLED BY, THIS COURT'S RECENT DECISION IN *REICH v. COLLINS*

In its Supplemental Brief, Petitioner ("Beam") inappropriately requests the extraordinary action of summary disposition on the merits of the instant case at the petition for certiorari stage. The State of Georgia respectfully submits that such a request is without merit, is completely unnecessary, and lacks a sufficient factual or legal predicate for serious consideration. The realistic options for consideration by the Court in the instant *Beam* case are the denial of certiorari (on, *inter alia*, the basis of an adequate and independent state ground for the decision below); the remanding of the case for further consideration in light of the Court's decision in *Reich v. Collins*, Docket No. 93-908, on December 6, 1994; or a consideration of the instant case on the merits with full briefing and oral argument.

Even a casual review of the decision by the Georgia Supreme Court in the instant case, reported at 263 Ga. 609, 437 S.E.2d 782 (1993), and the Georgia Supreme Court's decision in the *Reich* case, reported at 263 Ga. 602, 437 S.E.2d 320 (1993), shows that there are important differences between the two cases. First, the Georgia Supreme Court did not rule in the instant case that Georgia's general refund statute, O.C.G.A. § 48-2-35, did not apply to Beam. In fact, the Georgia Supreme Court assumed *arguendo* that such statute did apply to Beam, as Beam was asserting. Next, the legal incidence of the alcohol tax in question, as distinguished from the income

tax involved in the *Reich* case, was upon Georgia wholesalers, and Beam (a manufacturer) acted, in effect, as the State's collection agent in collecting and remitting that tax.

Also, as distinguished from the Georgia Supreme Court's new interpretation of the refund statute in *Reich*, in the instant *Beam* case the Georgia Supreme Court considered only well established, preexisting state law when determining whether or not Beam had standing to obtain a refund of taxes which its wholesalers paid to Beam to satisfy their own tax liability. The Georgia Supreme Court's ruling in the instant case not only has a fair and substantial basis under preexisting Georgia law, but the exclusive and well established line of authority on point under § 48-2-35 made such standing requirement clear. *See Eimco BSP Services Co. v. Chilivis*, 241 Ga. 263, 268, 244 S.E.2d 829 (1978); *Blackmon v. Georgia Independent Oilmen's Ass'n*, 129 Ga. App. 171, 174, 198 S.E.2d 896, 900 (1973); *Blackmon v. Premium Oil Stations, Inc.*, 129 Ga. App. 169, 170, 198 S.E.2d 900, 902 (1973). *See also Atlanta Americana Motor Hotel Corp. v. Undercofler*, 222 Ga. 295, 149 S.E.2d 691 (1966).

That Georgia rule of standing is similar to the rule under federal tax refund statutes, upon which § 48-2-35 was modeled. *See Hawes v. Bigbie*, 123 Ga. App. 122, 123, 179 S.E.2d 660, 661-62 (1970) and decisions under federal refund statutes, *e.g., United States v. Jefferson Electric Mfg. Co.*, 291 U.S. 386, 400, 402-03 (1934) ("We cannot assent to the view that a court may give a judgment awarding the taxpayer a refund without inquiring whether he has borne the burden of the tax or has reimbursed himself by collecting it from the purchaser"); *Travel Industries of Kansas, Inc. v. United States*, 425 F.2d 1297, 1300 (10th Cir.

1970) (stating that taxpayer's argument that statutory tax refund suits do not involve equitable considerations "has no authoritative support of which we are aware," and refusing a refund which would be a windfall to plaintiff); *Sharp & Dohme, Inc. v. United States*, 144 F.2d 456, 458-59 (3d Cir. 1944) (common law rule is that plaintiff who collected the taxes from another and did not bear the burden of the taxes lacks standing to maintain an action for refund); *Lit v. United States*, 18 F.Supp. 435, 439 (E.D. Pa. 1937) (refund action is governed by equitable principles). *See also Atchison, Topeka & Sante Fe Ry. v. Lennen*, 732 F.2d 1495, 1506-07 (10th Cir. 1984) (denying on equitable grounds a refund under state law where the taxes were paid without protest and the government had already expended the revenues).

In the instant context, Georgia's well established standing bar is entitled to deference, because the procedural bar serves legitimate state interests and does not preclude a recovery by a seller for taxes absorbed by the seller, but only for taxes reimbursed to the seller by his ultimately liable purchaser (the real taxpayer in interest) — thus preventing a double recovery by the seller of the taxes *qua* taxes.

For the above reasons alone, the *Beam* and *Reich* cases are different. However, there are other differences, even with regard to due process issues, because of the differences between certain predeprivation remedies available to alcohol taxpayers and others available to income taxpayers. Further, this Court expressly declined in its *Reich* decision to reach or to resolve any due process issue regarding the adequacy of Georgia's predeprivation remedies.

Therefore, Beam is simply incorrect in asserting that this Court's *Reich* decision disposes of the instant case as a matter of "summary" judgment.

CONCLUSION

There is no urgency or other extraordinary consideration which requires a summary disposition on the merits of the instant case. Since there are important factual and legal differences between the instant case and the *Reich* case, there is no merit to Petitioner's request for such a summary disposition. Respondents submit that the petition for certiorari should be denied, for all of the reasons set out in their "Op. Cert." Brief. If the Court decides not to deny the petition, however, the case should be remanded, or scheduled for briefing and argument on the merits.

Respectfully submitted,

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